

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SYBIL J. BROWN**

Claimant

VS.

**MEDICALODGES, INC.**

Respondent

AND

**TRANSPORTATION INSURANCE CO.**

Insurance Carrier

Docket No. 1,061,771

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the October 18, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for claimant. Bret C. Owen, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant did not prove by a preponderance of the evidence that she sustained an injury that arose out of and in the course of her employment. Accordingly, claimant's request for medical benefits and payment of unauthorized medical expense was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 17, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues she proved she suffered personal injury by repetitive trauma arising out of and in the course of her employment and her work activities were the prevailing factor in causing her work-related injury by repetitive trauma.

Respondent argues the ALJ correctly found claimant had not proved she sustained an injury that arose out of her employment. Respondent asks the Board to affirm the ALJ's Order.

The issue for the Board's review is: Did claimant suffer personal injury by repetitive trauma arising out of and in the course of her employment?

#### **FINDINGS OF FACT**

Claimant, who was 75 years old at the time of the preliminary hearing, began working for respondent on August 2, 2006, as a charge nurse. Claimant supervised a unit and passed medications using medicine carts. She described the carts as coming up to her waist and being approximately 5 feet long. The carts are on wheels but are extremely heavy. Claimant would push a medicine cart down a hallway and deliver medications to patients. The hallways were not straight and claimant would need to push the cart around corners, which was more difficult than pushing a cart in a straight line.

Around the beginning of 2011, claimant began to notice pain in her right groin that radiated to her right knee. She also began having lower back pain and a problem in her right foot. In January 2011, claimant was working extra hours because the other night nurse was on vacation. On average, she was working 12 to 14 hours a shift. From the end of January to the first of March 2011, she worked 22 consecutive overnight shifts. Claimant noticed her pain would be mild when she started her shift and, by the end of the shift, she would be in excruciating pain. The pain worsened from the beginning of a week to the end of a week.

Claimant testified she never had a single traumatic event while working at respondent. She believes her condition was the result of pushing the medicine carts. However, claimant later testified she remembered a time on March 3, 2011, when she was passing medication and needed to give a man an insulin injection. She leaned over to give the injection and "all of a sudden" she had pain.<sup>1</sup> She said that was the first time she felt her pain symptoms.

Around the first part of March 2011, claimant reported her injuries to Monica Roberts, respondent's director of nursing, telling her she thought the pain was from pushing the medicine carts. As the director of nursing, Ms. Roberts was claimant's supervisor. Ms. Roberts told claimant to take some time off and that she would notify the corporate office. Ms. Roberts removed claimant from the work schedule, and as of March 15, 2011, claimant began a 2 1/2 to 3 week leave of absence. Claimant used her vacation time for this.

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<sup>1</sup> P.H. Trans. at 29, 30.

Claimant was never provided medical treatment by respondent. She was not presented with an accident report. Ultimately, her symptoms were bad enough she sought medical treatment on her own. Claimant saw several doctors, but at the time of the preliminary hearing she was not being treated. She had been terminated by respondent on May 7, 2012, and no longer had health insurance coverage. After a period of time, claimant found new employment as a charge nurse for Brookdale Senior Living (Brookdale), but only worked there a little over two weeks, a period of about 29 1/2 hours. During the time she worked for Brookdale, her symptoms were aggravated, but after she stopped working there, her symptoms returned to what they were when she stopped working for respondent. At the time of the preliminary hearing, claimant was still having right groin pain that radiated to her right knee, as well as low back pain. She has a limp. Her right foot pain had resolved.

Claimant testified she has trouble getting in and out of a car because of her pain. She cannot sleep because of the pain in her leg, back and hip. She cannot lean over and reach like she used to. Claimant had no prior hip or back problems. She has no hobbies or activities outside of work that are similar to pushing a medicine cart.

Claimant saw Dr. Fermin Santos on March 31, 2011, with a complaint of low back pain and right buttock and groin pain which would at times radiate to the knee. She told Dr. Santos her pain had been ongoing since September 2010 with no inciting event. Dr. Santos noted in his report that "employment/work" made pain worse. Claimant testified Dr. Santos never told her she had been hurt because of her work, but he told her she worked too much.

On June 21, 2011, claimant saw Dr. Robert Gardiner with complaints of right hip pain. Dr. Gardiner's medical note states, "This was not the result of an injury."<sup>2</sup> Claimant said Dr. Gardiner never told her she had been hurt at work.

On October 4, 2011, claimant saw Dr. Joel Ackerman. She complained of back pain, right groin pain, and right leg pain with an onset one year earlier. Claimant told Dr. Ackerman the pain came on suddenly. She also told Dr. Ackerman about being a nurse and that after working a 12-hour shift, her pain increased.

Claimant saw Dr. Joseph Henry<sup>3</sup> on March 8, 2012. She complained to him of having back pain and groin pain for six months. Dr. Henry noted that claimant continued to have pain and "the etiology of the pain has never been adequately explained."<sup>4</sup> He recommended claimant see a neurosurgeon.

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<sup>2</sup> P.H. Trans., Resp. Ex. C at 1.

<sup>3</sup> Dr. Henry is claimant's brother.

<sup>4</sup> P.T. Trans., Resp. Ex. F.

Claimant saw Dr. Stephen Reintjes on April 20, 2012, and May 30, 2012. His report of April 20 indicated claimant had undergone an MRI scan of her lumbar spine, which showed a right L3-4 disc herniation. Claimant declined surgery, and Dr. Reintjes sent her to physical therapy. Claimant acknowledged Dr. Reintjes never said her physical symptoms were due to her work activities.

On September 14, 2012, claimant was examined by Dr. Edward Prostic at the request of claimant's attorney. Claimant told Dr. Prostic that while working for respondent repetitiously pushing a medicine cart, she became progressively sore in her low back and right hip. Dr. Prostic had x-rays taken, which revealed claimant had severe osteoarthritis of her right hip. After examining claimant, Dr. Prostic opined she sustained injury to her low back and aggravated preexisting "degenerative disc disease at her right hip."<sup>5</sup> [sic] Dr. Prostic said the rapid progression of claimant's hip disease was suspicious for avascular necrosis. He recommended claimant have total hip replacement arthroplasty. Dr. Prostic believed repetitive trauma while working for respondent was the prevailing factor in causing claimant's injury, medical condition and need for medical treatment. Dr. Prostic said he would prefer claimant have total hip replacement arthroplasty before lumbar discectomy because the lumbar condition would abate with the passage of time but the hip condition would not.

Claimant was examined by Dr. David Clymer on October 1, 2012, at the request of respondent. Claimant complained of back, right hip and groin pain which she said had been a progressive problem since early 2011. She did not recall any specific accidents or injuries which precipitated the problems but said the problems started when she was working long hours as a nurse at respondent when a coworker was on vacation. Dr. Clymer obtained new x-rays of claimant's low back and right hip. The lumbar spine x-rays revealed significant multilevel degenerative spondylosis with disc space narrowing and end plate spurring at multiple levels. X-rays of the right hip revealed severe end stage degenerative arthritis with significant joint space narrowing and deformity of the femoral head consistent with cyst formation and collapse possibly related to avascular necrosis.

Dr. Clymer believed claimant's work activities at respondent were not greatly different than other standing and walking activities she had performed over her many years as a nurse and while working retail sales. He believed claimant's problems were the result of a gradually progressive degenerative process, principally aging and routine activities. Further, he did not believe claimant's workplace activities rose to the level of being the principal and prevailing factor with regard to claimant's degenerative spondylosis in her low back and right hip, although the work activities may have caused some subjective symptomatic aggravation.

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<sup>5</sup> P.H. Trans., Cl. Ex. 1 at 3.

Claimant admitted that as a supervisor, one of her job responsibilities was to fill out accident reports if an employee was injured at work. She could have completed paperwork for the injuries she claims she sustained at respondent but did not. Claimant never asked respondent for treatment for her claimed injuries, and all of the medical treatment she received was on her own and paid for by her personal health insurance.

### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment. Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition. The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition. An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

### ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Dr. Santos diagnosed degenerative lumbar disc disease and lumbar spondylosis. While his report suggested claimant's work made the pain worse, he did not comment on whether the work activities aggravated the condition. The only reference to an aggravation in Dr. Santos' March 31, 2011, report is that claimant's pain was aggravated by maneuvering stairs and getting in and out of the car.

Dr. Gardiner examined claimant on June 21, 2011. His report contains no opinion on whether the work activities aggravated the claimant's hip condition. Dr. Ackerman examined claimant on October 4, 2011. Dr. Ackerman recorded a history of claimant's condition that states the onset of pain was sudden and started approximately one year prior to his examination, which is inconsistent with the history of a series. Dr. Reintjes, who examined and treated claimant in 2012, diagnosed a right L3-4 herniated disc but provided no opinion with regard to causation. The report of Dr. Reintjes' initial examination was included in the record.

Dr. Clymer, who was hired by respondent, diagnosed degenerative lumbar spondylosis and noted claimant's work activities were not the prevailing factor in causing claimant's condition, even though this is not the standard. Dr. Clymer provided no opinion related to whether the condition aggravated the degenerative condition.

Dr. Prostic, hired by the claimant, diagnosed degenerative disc disease and opined that claimant sustained an injury to her low back and aggravated a preexisting condition while working for respondent. Dr. Prostic, unnecessarily, provided the opinion that claimant's work activities were the prevailing factor in causing her condition. Dr. Prostic is the only physician that related the claimant's need for medical treatment to the alleged injury.

**CONCLUSION**

Based upon the foregoing, this Board Member finds claimant has failed to meet her burden of proof. The weight of the medical evidence does not support a conclusion that claimant's need for medical treatment is more probably than not the result of her work activities.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 18, 2012, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge